IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

FILED
UNITED STATES DISTRICT COURT
ALBUQUERQUE, NEW MEXICO

OCT 13 2000

CLERK

DENNIS FAIRBANKS,

Plaintiff,

v.

No. CIV

CIV 00 1437

DAVID R. PETTINGILL and
PETTINGILL ENTERPRISES, INC.,
a New Mexico corporation,

Defendants.

RICHARD L. PUGLISI

NOTICE OF REMOVAL TO UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

To: UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

COME NOW the Defendants, David R. Pettingill and Pettingill Enterprises, Inc., by and through their counsel of record, Guebert & Yeomans, P.C., and pursuant to 28 U.S.C. § 1441, 28 U.S.C. § 1446, Fed. R. Civ. P. 81(c) and D.N.M.LR-Civ. 81.1, move this Court to allow removal of the above-entitled action to the United States District Court for the District of New Mexico. As grounds therefore, Defendant would show:

1. On or about August 24, 2000, a Complaint for Violations of the Fair Labor Standards Act [29 U.S.C. § 201 et. seq.], Breach of Contract, Conversion, Fraud and Negligent Misrepresentation (hereinafter "Complaint") was filed in the Seventh Judicial District Court, County of Torrance, State of New Mexico. The case was docketed as Torrance County Cause No. D 0722-CV-2000-161. The Plaintiff is Dennis Fairbanks.

2. The Complaint names David R. Pettingill and Pettingill Enterprises, Inc., as the

Defendants. All the defendants consent to this Notice of Removal.

3. Pettingill Enterprises, Inc., was served through David R. Pettingill, President, with a copy of the Complaint and Summons on or about September 14, 2000. David R. Pettingill was personally served with a copy of the Complaint and Summons on or about September 14, 2000.

4. The Complaint asserts claims under the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201 (2000) et. seq., and New Mexico State Law. Specifically, this Complaint asserts a claim pursuant Section 16(b) of the FSLA, 29 U.S.C. § 216(b), because it asks for an award of unpaid overtime compensation, liquidated damages, attorneys fees, costs, prejudgment interest, and post judgment interest pursuant to 29 U.S.C. § 207 (2000).

5. The Complaint is a civil action over which this Court has jurisdiction pursuant to 28 U.S.C. § 1331 (2000), and 28 U.S.C. § 1337 (2000). *Barrett v. McDonald's of Oklahoma City, et. al.*, 419 F.Supp. 792 (D. W.D. Okla. 1976); *Goettel v. Glenn Berry Farms*, 236 F.Supp. 884 (D. N.D. Okla. 1964)(citing *State of Missouri ex. rel. St. Louis, Brownsville & Mexico Ry. Co. v. Taylor*, 266 U.S. 200, 45 S.Ct. 47, 69 L.Ed. 247 (1924)). This Court has supplemental jurisdiction pursuant to 28 U.S.C. § 1367 (2000). This civil action is removable by the Defendants under the provisions of 28 U.S.C. § 1441(a)(b) and (c) (2000) without regard to diversity of citizenship or the amount in controversy. *Goettel*, 236 F.Supp. 884 (1964). Venue is proper pursuant to 28 U.S.C. § 1391.

6. The Defendants David R. Pettingill and Pettingill Enterprises, Inc., may assert counterclaims over which this Court has jurisdiction pursuant to 15 U.S.C. § 1121 (2000) and 28 U.S.C. § 1338(b) (2000), such as unfair competition pursuant to Section 43(a) of the Lanham Act, 15 U.S.C. § 1125 (a), and common law unfair competition.

7. In accordance with D.N.M.LR-Civ 81.1(a), attached hereto are copies of all pleadings served upon the Defendants in Seventh Judicial District Court No. D 0722-CV-2000-161. **(Exhibits A, B, C & D)**

8. This Notice of removal was filed with this Court within thirty (30) days after service of the Complaint, which is the first pleading naming these Defendants.

9. Defendants David R. Pettingill and Pettingill Enterprises, Inc., upon filing of this Notice of Removal, gave written notice of the filing to Plaintiff as required by 28 U.S.C. § 1446(d), and filed a copy of this Notice of removal with the clerk of the Seventh Judicial District Court, County of Torrance, State of New Mexico, the Court from which this action is removed.

10. This Notice of removal is signed pursuant to Fed. R. Civ. P. 11.

WHEREFORE, the Defendants, David R. Pettingill and Pettingill Enterprises, Inc., pray that the above-entitled action be removed from the Seventh Judicial District Court, County of Torrance, State of New Mexico, to this Court.

GUEBERT & YEOMANS, P.C.

By ______________________________

Terry R. Guebert
Marcus E. Garcia
P. O. Box 93880
Albuquerque, NM 87199-3880
(505) 823-2300
Attorneys for Defendant

This is to certify that a copy of the foregoing Notice of Removal To United States District Court For The District of New Mexico was mailed to:

J. Edward Hollington
708 Marquette Avenue, NW
Albuquerque, NM 87102
(505) 843-9171

this 13th day of October, 2000.

____

5368.002\Notice of Removal to U.S. District Court.doc

COPY

SEVENTH JUDICIAL DISTRICT COURT
STATE OF NEW MEXICO
COUNTY OF TORRANCE

STATE OF NEW MEXICO
COUNTY OF TORRANCE
SEVENTH JUDICIAL DISTRICT COURT
FILED

AUG 24 2000
Time: 4:30
JULIEANNE WELCH, DEPUTY Clerk

DENNIS FAIRBANKS,

Plaintiff,

vs. **NO.** D 0722-CV-2000-161

DAVE R. PETTINGILL and PETTINGILL ENTERPRISES, INC., a New Mexico corporation,

Defendants.

COMPLAINT FOR VIOLATIONS OF THE FAIR LABOR STANDARDS ACT [29 U.S.C. § 201 et seq.], BREACH OF CONTRACT, CONVERSION, FRAUD AND NEGLIGENT MISREPRESENTATION

COMES NOW, the Plaintiff Dennis Fairbanks, by and through his attorney of record, J. Edward Hollington, J. Edward Hollington & Associates, P.A., and for his complaint against the Defendants states:

1. Plaintiff Dennis Fairbanks, hereinafter "Mr. Fairbanks", is a resident of Moriarty, Torrance County, New Mexico.

2. Defendant Dave R. Pettingill is a resident of Mountainair, Torrance County, New Mexico.

3. Defendant Pettingill Enterprises, Inc., hereinafter "PEI", is a New Mexico corporation principally located in Torrance County, New Mexico. PEI's New Mexico corporation number is 1990449.

4. Mr. Fairbanks was employed as a fabricator and welder by the Defendants from May of 1999, until his termination in July 7, 2000.

EXHIBIT
A

5. Defendants were engaged in the business of building and selling conveyor machines.

6. Mr. Fairbanks designed a conveyor machine which was better quality, more reliable, and better durability than the conveyors previously built by the Defendants before the Plaintiff began working with them.

7. The Defendant Dave Pettingill, promised that if Plaintiff designed and built an improved conveyor, he would pay him a royalty fee of $500.00 on each machine.

8. Mr. Fairbanks developed drawings and specifications for the new conveyor and based on promises made by the Defendants, delivered the plans and specifications to Defendants.

9. Mr. Fairbanks worked day and night, seven (7) days a week to produce conveyors which he had developed and designed.

10. Mr. Fairbanks was paid $13.00 an hour. He was required to work over forty (40) hours per week; yet he was not paid overtime.

11. Mr. Fairbanks worked one thousand five hundred eighty-six and one-half (1,586 and 1/2) hours of overtime during his employment with the Defendants.

12. Mr. Fairbanks asked the Defendants about payment for overtime and was told by Defendant Dave Pettingill, that he does not pay overtime.

13. The Defendants have sold at least sixteen (16) conveyor machines without paying Plaintiff the agreed royalty fee of $500.00 per machine.

14. Plaintiff's rate for overtime pay under the Fair Labor Standards Act, hereinafter "FLSA" 29 U.S.C § 201 et seq., is $19.50 per hour.

15. The Defendants were regularly late in paying Mr. Fairbanks and other employees' wages.

16. Mr. Fairbanks made demand on the Defendants for payment of wages, overtime and royalty fees.

17. Defendant Dave Pettingill responded by firing Mr. Fairbanks.

18. Plaintiff has been required to retain the services of an attorney and has incurred attorney fees and costs in bringing this action.

COUNT I
VIOLATIONS OF FLSA

19. Plaintiff hereby incorporates all allegations contained in the foregoing paragraphs 1 through 18 above as though the same are fully set forth herein.

20. Defendants are employers engaged in the industry affecting commerce under FLSA.

21. Mr. Fairbanks was a non-exempt employee as defined by FLSA.

22. Plaintiff worked one thousand five hundred eighty-six and one-half (1,586 and 1/2) hours in excess of forty (40) hour work weeks during his employment.

23. The Defendants had a duty to compensate Mr. Fairbanks at the federal rate of time and one-half for any hours in excess of forty (40) hours per week.

24. Defendants did not compensate Plaintiff at the overtime rate as required by law for hours worked over forty (40) hours per week.

25. The Defendants' actions were willful and have caused Mr. Fairbanks loss of income.

WHEREFORE, Plaintiff respectfully requests this Court to enter judgment against the Defendants and award him relief as follows:

a. $30,936.75 for unpaid overtime;

b. liquidated damages as provided by FLSA;

c. attorney fees and costs;

d. pre-judgment and post-judgment interest; and

d. such other and further relief as the Court deems just and appropriate.

COUNT II
BREACH OF CONTRACT

26. Plaintiff hereby incorporates all allegations contained in the foregoing paragraphs 1 through 25 above as though the same are fully set forth herein.

27. The Defendants made promises to Mr. Fairbanks that if he [Mr. Fairbanks] developed, designed and built conveyors, the Defendants would pay Mr. Fairbanks a royalty fee of $500.00 for each machine sold.

28. Mr. Fairbanks developed, designed and built conveyors as agreed.

29. The Defendants breached the terms of the contract by refusing to pay Mr. Fairbanks $500.00 per machine as promised.

30. The Defendants have sold at least sixteen (16) machines.

31. The Defendants owe Mr. Fairbanks $8,000.00 for sixteen (16) machines sold plus $500.00 for any additional machines sold.

32. Defendants breach of the contract was done with malice and ill-will and Mr. Fairbanks is entitled to punitive damages.

WHEREFORE, Plaintiff respectfully requests this Court to enter judgment against the Defendants and award him damages for breach of contract as follows:

a. $8,000.00 for sale of sixteen (16) machines and $500.00 for any additional machines sold;

b. punitive damages;

c. pre-judgment and post-judgment interest; and

d. such other and further relief as the Court deems and appropriate.

COUNT III
CONVERSION

33. Plaintiff hereby incorporates all allegations contained in the foregoing paragraphs 1 through 32 above as though the same are fully set forth herein.

34. Defendants have taken Mr. Fairbanks' plans and designs for conveyors without compensation or consideration.

35. The Plaintiff did not assign or transfer to the Defendants his proprietary rights to the plans and designs for the conveyor machines.

36. The Defendants wrongfully took Plaintiff's plans and designs with intent to defraud the Plaintiff of his proprietary rights to exploit the conveyors.

37. Defendants' conduct is wanton, willful and malicious and Mr. Fairbanks is entitled to punitive damages.

WHEREFORE, Plaintiff respectfully requests this Court to enter judgment against the Defendants for conversion and award Plaintiff reasonable value for his proprietary rights for the plans and designs of the conveyors or in the alternative enjoin the Defendants from any further exploitation of Plaintiff's proprietary rights, for reasonable attorney fees, costs, pre-judgment and post-judgment interest, and such other and further relief as the Court deems just and appropriate.

COUNT IV
FRAUD

38. Plaintiff hereby incorporates all allegations contained in the foregoing paragraphs 1 through 37 above as though the same are fully set forth herein.

39. Defendants made false misrepresentations to Mr. Fairbanks for the purpose of inducing him into developing and designing a conveyor machine.

40. Defendants represented to Mr. Fairbanks that he would be continuously employed and would receive a royalty fee of $500.00 from the sale of each machine which Mr. Fairbanks had developed and designed.

41. The Defendants representations were false.

42. Mr. Fairbanks has been damaged as a proximate result of the Defendants' fraud.

43. Defendants' conduct constitute willful, wanton, and malicious actions against Plaintiff and Mr. Fairbanks is entitled to punitive damages.

WHEREFORE, Plaintiff respectfully requests this Court to enter a judgment against the Defendants and award Plaintiff damages to be determined at trial, plus pre-judgment and post-judgment interest, punitive damages and such other and further relief as the Court deems just and appropriate.

COUNT VI
NEGLIGENT MISREPRESENTATION

44. Plaintiff hereby incorporates all allegations contained in the foregoing paragraphs 1 through 43 above as though the same are fully set forth herein.

45. Defendants made false misrepresentations to Mr. Fairbanks for the purpose of inducing him into developing and designing a conveyor machine.

46. Defendants represented to Mr. Fairbanks that he would be continuously employed and would receive a royalty fee of $500.00 from the sale of each machine which Mr. Fairbanks had developed and designed.

47. The Defendants representations were false.

48. Mr. Fairbanks has been damaged as a proximate result of the Defendants' fraud.

49. Defendants' conduct constitute willful, wanton, and malicious actions against Plaintiff and Mr. Fairbanks is entitled to punitive damages.

WHEREFORE, Plaintiff respectfully requests this Court to enter a judgment against the Defendants and award Plaintiff damages to be determined at trial, plus pre-judgment and post-judgment interest, punitive damages and such other and further relief as the Court deems just and appropriate.

Respectfully submitted:

J. Edward Hollington & Associates, P.A.

J. Edward Hollington
Attorney for Plaintiff
708 Marquette, NW
Albuquerque, New Mexico 87102
(505) 843-9171
(505) 843-7027 Fax

STATE OF NEW MEXICO
COUNTY OF TORRANCE
SEVENTH JUDICIAL DISTRICT COURT
FILED
SEP 25 2000
Time: 10:10
VIOLA LUERAS, Clerk

SEVENTH JUDICIAL DISTRICT COURT
STATE OF NEW MEXICO
COUNTY OF TORRANCE

DENNIS FAIRBANKS,

Plaintiff,

vs. NO. D 0722-CV-2000-161

DAVE R. PETTINGILL and
PETTINGILL ENTERPRISES,
INC., a New Mexico corporation,

Defendants.

SUMMONS

TO: Dave R. Pettingill
308 N. Hanlon Avenue
Mountainair, New Mexico

Defendant(s), Greeting:

You are hereby directed to serve a pleading or motion in response to the Complaint within 30 days after service of the Summons, and file the same, all as provided by law.

You are notified that, unless you so serve and file a responsive pleading or motion, the Plaintiff(s) will apply to the Court for the relief demanded in the Complaint

Attorney or Attorneys for Plaintiff: J. Edward Hollington
Address: 708 Marquette Avenue, N.W.
Albuquerque, NM 87102-2035
(505) 843-9171

WITNESS the Honorable EDMUND H. KASE III, District Judge of said Court of the State of New Mexico and the Seal of the District Court of said County, this 24th day of AUGUST, 2000.

Viola Lueras
CLERK OF THE DISTRICT COURT

(SEAL)

By: Julieanne Welch
Deputy

NOTE: This summons does not require you to see, telephone or write to the District Judge of the Court at this time. It does require you or your attorney to file your legal defenses to this case in writing with the Clerk of the District Court within 30 days after the summons is legally served on you. If you do not do this, the party suing may get a Judgment by default against you.

IF YOU WANT THE ADVICE OF A LAWYER AND DON'T KNOW ONE, YOU MAY WISH TO CALL THE ALBUQUERQUE BAR ASSOCIATION LAWYER REFERRAL SERVICE AT 243-2615, OR THE STATE BAR STATEWIDE LAWYER REFERRAL SERVICE AT 842-6132

EXHIBIT
B

RETURN OF SERVICE

STATE OF NEW MEXICO)
) ss.
COUNTY OF Torrance)

RETURN FOR COMPLETION BY SHERIFF OR DEPUTY:

I certify that I served the within Summons in said County on the 14 day of September, 2000 by delivering a copy thereof, with copy of Complaint, Plaintiff's First Request for Production to Defendant Dave Pettingill, and the Certificate of Service attached, in the following manner:

RETURN FOR COMPLETION BY OTHER PERSON MAKING SERVICE:

I, being duly sworn, on oath, say that I am over the age of 18 years and not a party to this lawsuit, and that I served the within Summons in said County on the _____ day of ____________, 2000, by delivering a copy thereof, with copy of Complaint Plaintiff's First Request for Production to Defendant Dave Pettingill, and the Certificate of Service attached, in the following manner:

(check one box and fill in appropriate blanks)

[X] To Defendant Dave R. Pettingill (used when Defendant receives copy of Summons, is read Summons or Complaint or refuses to receive Summons or hear reading).

[ ] To ______________________, a person over the age of 15 years and residing at the usual place of abode of Defendant ______________________, who at the time of such service was absent therefrom.

[ ] By posting a copy of the Summons and Complaint in the most public part of the premises of Defendant ______________ (used if no person found at dwelling house or usual place of abode)

[ ] To ______________________, an agent authorized to receive service of process for Defendant ______________.

[ ] To ______________________ (parent) (guardian) of Defendant ______________________ (used when Defendant is a minor or an incapacitated person).

[ ] To ______________, ______________ (name of person) ______________ (title of person) authorized to receive service (Used when Defendant is a corporation or association subject to a suit under a common name, a land grant board of trustees, the State of New Mexico or any political subdivision.)

Fees: [signature]

____
Signature of Private Citizen Making Service

SHERIFF OF Torrance
COUNTY State of New Mexico

Subscribed and sworn to before me
this _____ day of _________, 2000.

____
Sheriff

By: [signature]
Deputy

____
Notary or Other Officer
Authorized to Administer Oaths

____
Title

COPY

STATE OF NEW MEXICO
COUNTY OF TORRANCE
SEVENTH JUDICIAL DISTRICT COURT
FILED
SEP 25 2000
Time: 10:10
VIOLA LUERAS, Clerk

SEVENTH JUDICIAL DISTRICT COURT
STATE OF NEW MEXICO
COUNTY OF TORRANCE

DENNIS FAIRBANKS,

Plaintiff,

vs. NO. D 0722-CV-2000-161

DAVE R. PETTINGILL and
PETTINGILL ENTERPRISES,
INC., a New Mexico corporation,

Defendants.

SUMMONS

TO: Pettingill Enterprises, Inc.
308 N. Hanlon Avenue
Mountainair, New Mexico

Defendant(s), Greeting:

You are hereby directed to serve a pleading or motion in response to the Complaint within 30 days after service of the Summons, and file the same, all as provided by law.

You are notified that, unless you so serve and file a responsive pleading or motion, the Plaintiff(s) will apply to the Court for the relief demanded in the Complaint.

Attorney or Attorneys for Plaintiff: J. Edward Hollington
Address: 708 Marquette Avenue, N.W.
Albuquerque, NM 87102-2035
(505) 843-9171

WITNESS the Honorable EDMUND H. KASE III District Judge of said Court of the State of New Mexico and the Seal of the District Court of said County, this 24th day of AUGUST, 2000.

Viola Lueras
CLERK OF THE DISTRICT COURT

(SEAL)

By: Julieanne Welch
Deputy

NOTE: This summons does not require you to see, telephone or write to the District Judge of the Court at this time. It does require you or your attorney to file your legal defenses to this case in writing with the Clerk of the District Court within 30 days after the summons is legally served on you. If you do not do this, the party suing may get a judgment by default against you.

IF YOU WANT THE ADVICE OF A LAWYER AND DON'T KNOW ONE, YOU MAY WISH TO CALL THE ALBUQUERQUE BAR ASSOCIATION LAWYER REFERRAL SERVICE AT 243-2615, OR THE STATE BAR STATEWIDE LAWYER REFERRAL SERVICE AT 842-6132

EXHIBIT
C

RETURN OF SERVICE

STATE OF NEW MEXICO)
) ss.
COUNTY OF Torrance)

RETURN FOR COMPLETION BY SHERIFF OR DEPUTY:

I certify that I served the within Summons in said County on the 24 day of September 2000 by delivering a copy thereof, with copy of Complaint, Plaintiff's First Request for Production to Defendant Pettingill Enterprises, Inc., and the Certificate of Service attached, in the following manner:

RETURN FOR COMPLETION BY OTHER PERSON MAKING SERVICE:

I, being duly sworn, on oath, say that I am over the age of 18 years and not a party to this lawsuit, and that I served the within Summons in said County on the _____ day of ___________, 2000, by delivering a copy thereof, with copy of Complaint Plaintiff's First Request for Production to Defendant Pettingill Enterprises, Inc., and the Certificate of Service attached, in the following manner:

(check one box and fill in appropriate blanks)

[X] To Defendant Dave R. Pettingill (used when Defendant receives copy of Summons, is read Summons or Complaint or refuses to receive Summons or hear reading).

[ ] To ______________________, a person over the age of 15 years and residing at the usual place of abode of Defendant ______________________, who at the time of such service was absent therefrom.

[ ] By posting a copy of the Summons and Complaint in the most public part of the premises of Defendant ______________ (used if no person found at dwelling house or usual place of abode).

[ ] To ______________________, an agent authorized to receive service of process for Defendant ______________.

[ ] To ______________________ (parent) (guardian) of Defendant ______________________ (used when Defendant is a minor or an incapacitated person).

[ ] To ______________, ______________ (name of person) ______________ (title of person) authorized to receive service (Used when Defendant is a corporation or association subject to a suit under a common name, a land grant board of trustees, the State of New Mexico or any political subdivision.)

Fees 0

____
Signature of Private Citizen Making Service

SHERIFF OF Torrance
COUNTY State of New Mexico

Subscribed and sworn to before me this _____ day of _________, 2000.

____
Sheriff

____
Notary or Other Officer
Authorized to Administer Oaths

By: [signature]
Deputy

____
Title

COPY

SEVENTH JUDICIAL DISTRICT COURT
STATE OF NEW MEXICO
COUNTY OF TORRANCE

STATE OF NEW MEXICO
COUNTY OF TORRANCE
SEVENTH JUDICIAL DISTRICT COURT
FILED
AUG 24 2000
Time: 4:30
JULIEANNE WELCH, DEPUTY Clerk

DENNIS FAIRBANKS,

Plaintiff,

vs. NO. D 0722-CV-2000-161

DAVE R. PETTINGILL and
PETTINGILL ENTERPRISES,
INC., a New Mexico corporation,

Defendants.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that Plaintiff's First Request for Production to Defendant Pettingill Enterprises, Inc., and Plaintiff's First Request for Production to Dave Pettingill, along with a copy of this certificate, were served on Defendants with the Summons and Complaint.

Respectfully submitted:

J. Edward Hollington & Associates, P.A.

J. Edward Hollington
Attorney for Plaintiff
708 Marquette, NW
Albuquerque, New Mexico 87102
(505) 843-9171
(505) 843-7027 Fax

EXHIBIT
D